No. 12199

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges Thereof:

Comes now Barbara Karrell, appellant in the above entitled cause, and presents this her petition for a rehearing of said cause and for a reversal of the judgment for the reasons herein stated.

The record in this case plainly establishes the following propositions:

(1) Appellant did not commit the offenses charged in the manner alleged in Counts 4, 6, 9, 11, 12 and 14 of the indictment;

(2) Appellant did not commit any offense against the United States;

(3) Appellant was convicted of some undesignated offense, and not as charged in the indictment;

(4) There is no substantial evidence to support the judgment of conviction;

(5) Appellant's conviction is the result of calculated prejudice and plain mass hysteria;

(6) If any one was guilty of making, or causing to be made, false reports, it was the Bank of America and each veteran who signed, under criminal penalties, the application and report made to the Veterans' Administration;

(7) There is not one word of evidence showing that appellant concealed the true prices paid to her for the lots involved from the Bank or from the veteran, or from the Veterans' Administration; and

(8) There is no evidence at all that appellant caused the Bank and the veterans to make false reports to the Veterans' Administration.

The conviction in this case is without any factual support, and is a travesty on justice. Instead of prosecuting the veterans, who kowingly and deliberately signed and certified false statements, and the powerful Bank, which had actual documentary knowledge of the falsity of its reports and profited directly therefrom, the Government singled out a poor woman for prosecution who was under no duty to report to the Veterans Administration the price paid for a lot, and who did not even know that any such report was required to be made. The verdict of the jury, and the judgment thereon, holding that appellant concealed the prices paid for lots from and thereby caused the Bank to make false reports to the Veterans Administration are utterly absurd and would fall within the maxim *reductio ad absurdum* if it were not for the tragic fact that the verdict and judgment punish the innocent and allow the guilty to escape both prosecution and punish-

ment. We cannot believe that this Court will permit the unjust, and unjustified, verdict and judgment to stand when the plain and undisputed facts in evidence are further considered.

The decision of this Court rests, apparently, upon the following erroneous considerations (Opinion, p. 7):

(1) That appellant initiated the escrow method used, first by the Bank and then by appellant;

(2) That said method was used to deceive the Bank, and thereby to cause it to make false reports to the Veterans Administration;

(3) That, while appellant may not have known exactly what the appraisal of each lot would be, "she knew something of its appraisal value";

(4) That appellant wanted the Bank and veteran to make a false report to the Veterans Administration, presumably for their joint benefit; and

(5) That "in some (wholly unexplained) manner (appellant) procured the Bank to cooperate in her scheme to accomplish this end."

With all possible respect due the Court, we assert that each and every reason mentioned by it for affirming the judgment is unsound, because the facts in evidence are squarely opposed thereto. Some of the vital facts overlooked by the Court are now stated.

In each of the loans, referred to in the Counts upon which appellant was convicted, the veteran and the Bank signed two completed forms, to-wit, an "Application for Home Loan Guaranty" and a "Home Loan Report" to the Veterans Administration.

The "Application for Home Loan Guaranty" provided for the following information, under Criminal penalties for fraud, etc.:

> "1. The undersigned veteran applies to the undersigned lender for a loan for the purposes stated herein, and both apply to the Administrator of Veterans Affairs for guaranty of said loan . . .
>
> "2. Purpose of the loan is . . .
>
> "3. *Purchase price or cost* (is) $..... Amount of Loan (is) $....., Guaranty requested (is) $..... . . . . Signature of veteran . . .
>
> "9. All the information reflected by this application is true to the best of the lender's information and belief. ..... Lender." (Veterans Benefits (1948 Supp.) page 90.)

The "Home Loan Report," in each instance, provided for signature by the veteran and lender, under penalties for fraud, and contained, *inter alia,* the following (Veterans Benefits (Pet. Supp.) pp. 96-97).

1. Amount of the loan, purpose, etc.

2. Certificate of lender, stating disbursements to the seller or contractor; existing liens; total *cost;* taxes; fire insurance; other insurance; fees, appraisal; fees, inspector; miscellaneous; total expenses, less cash or other credit and less primary loan; and amount of loan for guaranty or insurance. The certificate provides for statement of amount of escrow, and "That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, alterations or improvements does not exceed the reasonable value thereof as determined by proper appraisal dated .... made by .....

an appraiser designated by the Administrator (appraisal attached)." (*Id.*) This certificate is signed by the lender, and is likewise signed by the veteran. Since the appraisal report is filed with the above mentioned Application and Report, it is obvious that both lender and veteran knew that the appraisal values of the lot and improvements were less than the cost thereof. But this must be considered in connection with what is actually shown by the evidence in this case.

The following facts appear from Exhibits 11-A, 13-A, 15-A, 16-A, 17-A and 18-A on file herein, showing that appellant could not have known, at the time she prepared the escrow papers, what were, or would be the appraised values of the lots involved:

Count of Indictment	Name of Veteran	Date of Escrow	Date of Appraisal Report	Date of Report to V. A.	Exhibit No.
4	Philip Bentivegna	7-20-46	7-24-46	8-17-46	11-A
6	David Wilder	7-12-46	7-23-46	8-12-46	13-A
9	Fritz Kornfeld	6-17-46	7-11-46	8-12-46	15-A
11	John L. Chamberlain	6-25-46	7-10-46	8- 8-46	16-A
12	David Bruce Register	6- 5-46	7- 3-46	9-11-46	17-A
14	Louis Martin Higgins	5-19-46	5-29-46	7- 2-46	18-A

In each and every instance involved, the report of the appraiser on the value of the lot was made several days or weeks *after* the escrow papers were filed with the Bank. Since neither conspiracy nor connivance between the appraiser and appellant, or between the Bank and appellant is alleged, or proven, or even suggested, it is preposterous to assume that appellant did, or could, know at the time she filed the several escrow papers that the prices paid for the lots exceeded the appraised value thereof.

Additional pertinent facts, many if not all of them uncontroverted, will appear *infra*.

ARGUMENT.

I.

The Grounds Upon Which the Court Sustains the Conviction Are at Variance With the Allegations of the Indictment.

The indictment charges that appellant "did knowingly cause to be made a false certificate or paper . . . in that defendant did cause the Bank . . . Santa Monica California Branch to certify . . . that the price paid . . . for the purchase of a residential lot . . . did not exceed (the appraisal value) . . . *whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration the total price demanded and received* . . . (therefor) *did exceed the reasonable value thereof as determined by a proper appraisal.*" (Italics ours.)

The very essence of the offense charged in each count of the indictment is concealment by appellant from the Bank of the true price paid by each veteran for his lot. But, the escrow papers filed with the Bank completely refute this allegation of concealment. Moreover, this Court, doubtless recognizing the complete lack of evidence to show concealment from the Bank, said at page 7 of the Opinion:

> "In the main the argument is that the proof clearly discloses that the lender was not deceived. *It is true that information furnished the bank through both branches constituted a full statement of the facts.*" (Italics ours.)

The allegation of concealment is not only the vital essence of each offense charged, but such concealment constitutes the actual means or method by which appellant

is alleged to have procured the Bank to make false reports to the Veterans Administration. Appellant was thus presented with the specific charge and issue that she caused the Bank to make false reports by concealing from it the prices paid by the veterans for their lots. Having presented the issue in that form, the Government must prove it as charged. Failure to so prove it constitutes a variance for which a reversal should be ordered.

It is well settled that where an indictment alleges the manner, or means, by which an offense is committed, the evidence must conform substantially to such allegations.

> 42 C. J. S. 1286, Sec. 262, Indictments and Informations, and cases cited in Notes 54-57;
>
> 31 C. J. 846, Sec. 460, and cases cited in Notes 79-81.

The rule is thus stated in 42 C. J. S. 1286:

> "The part of the charge describing the manner of the offense must conform substantially to the evidence introduced to support it. Where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment. A material variance in descriptive matter is fatal, even though the description is unnecessarily particular. . . ."

The Government chose to charge appellant with causing a crime to be committed by concealment. When its charge of concealment failed to stand up, it then and there lost its case, or should have lost it, under the law applicable. Both the Government and this Court, however, fall back upon the inexplicable statement that since appellant desired a

false report to be made she "in *some* manner procured the bank to cooperate in her scheme to accomplish this end." (Italics ours.) (Op. p. 7.) Such a statement does not meet the ends of justice nor the requirements of the law.

It is uniformly held that where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment.

42 C. J. S. 1286, *supra;*

31 C. J. 846, *supra;*

People v. Carson, 155 Cal. 164;

State v. Beckendorf, 79 Utah 360, 10 P. 2d 1073, 1074;

Fuller v. State, 120 Tex. Crim. 66, 48 S. W. 2d 303, 304;

Brown v. State, 48 Ind. 38;

State v. McConkey, 20 Iowa 574;

Commonwealth v. McCarthy, 145 Mass. 575, 14 N. E. 643;

Com. v. Hartwell, 128 Mass. 415;

Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647;

Com. v. Moore, 130 Mass. 45;

Com. v. Bossidy, 112 Mass. 277;

State v. Young, 163 Mo. App. 88, 138 S. W. 70;

People v. Fulle, 12 Abb. N. Cas. 196, 1 N. Y. Cr. 172;

Com. v. Tobias, 141 Mass. 129;

Com. v. Luscomb, 130 Mass. 42;

Novy v. State, 62 Tex. Crim. 492;

Randle v. State, 12 Tex. Crim. 492, 496, 138 S. W. 139;

Kennedy v. State, 9 Tex. App. 399;

People v. Hubbard, 141 Mich. 96, 104 N. W. 386;

1 Greenleaf on Ev. Sec. 65.

In *Novy v. State,* 62 Tex. Crim. 492, the Court said:

> "It has long been the established doctrine that, when an offense is charged to have been committed in one way, it is error for the Court, over the defendant's objections, to authorize the jury to convict, if the evidence shows that he violated the statute in some other way not charged in the indictment or information."

In the case at bar, no other way than by concealment is charged, or attempted to be proved. We have as an alternative to concealment, only the statement that "in some (unindicated) manner" appellant procured the Bank to make a false report.

In *State v. Young,* 163 Mo. App. 88, the Court said at page 98:

> "When the state charges a violation in a particular way, it must be bound by the position it takes, and is not entitled to a verdict in its favor unless it makes proof of the particular charge which it has made. (Citing numerous cases.)"

In *Fuller v. State,* 120 Tex. Crim. 66, the Court said at page 67:

> "The party charged with an offense is entitled to have, if an offense may be committed in various modes, that mode stated in the indictment which was

> proven at the trial, and when one mode is stated and the proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance."

It cannot be doubted that the offense of causing or procuring a lender to make a false report to the Veterans Administration may be committed in numerous ways, for example, by bribery, coercion, persuasion of a political or personal nature, or concealment of the facts. Other ways are also possible. So, this case comes squarely within the rule stated.

Moreover, it is settled law that all of the material allegations of an indictment must be proved *as charged.*

> 42 C. J. S. 1262;
>
> *United States v. Johnson,* 123 F. 2d 111;
>
> *Philyow v. United States,* 29 F. 2d 225;
>
> *United States v. Summers,* 123 F. 2d 111.

And, where there is a material discrepancy between the averments and the proof, there is a variance.

> 42 C. J. S. 1273;
>
> *Fox v. United States,* 45 F. 2d 364;
>
> *Andrews v. United States,* 108 F. 2d 55;
>
> *Meyers v. United States,* 3 F. 2d 379;
>
> *Cf. Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629.

Inasmuch as the indictment alleged the procuring of false reports by concealment, appellant was entitled to an acquittal unless that particular mode of procuring was established by the proof.

Other facts conclusively show: (1) That appellant did not initiate the escrow or other methods of handling the loan and reporting to the Veterans Administration; (2) that appellant knew nothing of the appraisal values of the lots until the indictment was returned against her; (3) that both the Bank and the builder of the houses instructed appellant how to make out the escrow instructions; (4) that appellant did not know that a report was required to be made by the Bank to the Veterans Administration; (5) that appellant was a mere broker, and received only a commission on each lot sale; and (6) that she neither procured, nor had any means of procuring, the Bank to make false reports.

II.

Since the Bank Had Full Knowledge of the True Price Paid for Each Lot Involved, Appellant Neither Concealed the True Price, nor Thereby Caused the Bank to Make a False Certificate to the Veterans Administration.

In its opinion, at page 7, this Court said:

> "It is true that information furnished the Bank through both branches constituted a full statement of the facts. But this is beside the point. The method used, *which was initiated and made possible by appellant,* was for the purpose of securing a false report to go to the Government and it was highly successful." (Italics ours.)

A. Appellant Did Not Initiate the Escrow Method Used.

The last above quoted statement of the Court is not only a *non sequitur,* but is factually erroneous. The defendant testified without contradiction that prior to the sales here involved she was not familiar with the method

of handling escrows. [Rep. Tr. p. 455, lines 12-15.] She then testified as follows:

> "A. The first house that I sold was where a veteran furnished his own lot, and we went to the Bank of America in Santa Monica *and the escrow department there made up the escrow instructions for me.*" [Rep. Tr. p. 455, lines 19-23.] (Italics ours.)

> "Q. Just a moment. Do you remember who it was you talked to there? A. Well, I talked to two people there; first, the lady in charge of the department, a Mrs. Renchler, and then she turned me over, an hour or so later after the instructions were made up, to a gentleman.
>
> Q. Do you remember his name? A. No; I don't.
>
> Q. Was he somebody in the escrow department? A. A regular employee, yes. *And she said, in handling any veterans' deals they wanted to recite the following which she had typed in the escrow instructions.*" [Rep. Tr. p. 456, lines 3-14.] (Italics ours.)

> "Q. Do you have the escrow instruction which she gave you as a sample? A. No; I don't have the escrow (instruction), but all of these are patterned after it, all the escrow instructions that I made up." [Rep. Tr. p. 456, lines 20-24.]

The defendant's testimony, *supra,* is uncontradicted. It shows that the head of the escrow department of the Santa Monica Branch of the Bank (the certifying Branch) "Initiated" the escrow method used by defendant and directed her to use such method, and that she did use it in accordance with the typed form supplied by Mrs. Renchler of the Bank.

The testimony above quoted does not justify this Court's statement (Op. p. 7) that "She desired a false report to go from the lending Bank to the Government officials who passed upon the loans and in some manner procured the Bank to cooperate in her scheme to accomplish this end." It is unreasonable, under the uncontradicted evidence, *supra,* to conclude that appellant either "initiated" the escrow method, or that "in some (unexplained) manner (she) procured the bank to cooperate in her scheme."

B. Appellant Did Not Procure the Bank to Make False Reports to the Veterans Administration.

This Court has, in reality, sustained defendant's conviction on the ground that, by concealing from the Bank and Veterans' Administration the true prices paid by the veterans for their respective lots, she procured or caused the Bank to make false reports to the Veterans Administration. This Court has said in this connection (Op. p. 7):

> "She desired a false report to go from the lending bank to the Government officials who passed upon the loans *and in some* (undisclosed) *manner procured the bank to cooperate in her scheme to accomplish this end.*" (Italics ours.)

The Government, in the absence of proof, *assumed* that appellant desired a false report to be made concerning the true price paid for each lot. This Court has adopted the Government's assumption. But, where is the proof of any such desire? The record is challenged for support of any such assumption. If there is a single word of direct evidence to support the assumption, the Government has not cited, nor has Court referred to, it. The

only semblance of such evidence (and it does not sustain the assumption) is found on page 9 of the Government's Brief, where the defendant is quoted as testifying, as to the double escrows:

> "Well, I don't remember the exact words I told him (the veteran Kornfield), but in substance it was the same as I had told all the rest of the G. I.'s; that we had to open two escrows and one of them was for the amount of the loan and the other was for the purchase price of the lot."

And in respect to the single escrow:

> "Well, the same reason in this case as it was in the other one; some of them were two escrows and some of them were one, and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

C. Appellant Was Instructed by the Bank and the Builder of the Houses to Make Double Escrows.

The factual background of the quoted testimony will show that the appellant was acting under instructions from the Bank and from the builder of the houses erected on the lots. Let us examine that background.

First, appellant was, in fact, a mere broker. She never had legal title to any of the lots. [Rep. Tr. p. 459.] Each lot was conveyed to the veteran by the true owner, Mr. Embricas [Rep. Tr. p. 457, lines 17-19; *id.* p. 459, lines 7-18], as shown by appellant's testimony [Rep. Tr. p. 459, lines 7-16], which is uncontradicted.

Second, the Bank instructed appellant to prepare the double escrow instructions in the manner followed by her.

[Rep. Tr. p. 456, lines 3-14 and 20-24, and p. 463, lines 4-10 *ante.*]

Third, the builder of the houses instructed defendant to make two escrows, in respect to which she testified as follows [Rep. Tr. p. 463, lines 13-25, and p. 464, lines 1-21]:

> "A. . . . I had been instructed by the builder, too, to make two escrows, but I had gotten my escrow instruction furnished at the escrow department at Santa Monica, who told me to use this form that they had handed me in any future transaction. So when I started selling these lots I took the escrow instructions in to the Bank of America at Pico-LaCienega, *and the first ones they made up themselves.* Then when we had so many of them, I said, 'Well, I can make them up to save the veterans' time on it. They won't have to take off work and they can come in in the evenings or Sunday afternoon and sign them.' And that was the reason the escrow instructions were made up in my office.
>
> Q. When you made the first sale of lots in that tract together with a contract to build houses on them, the escrow instructions were prepared by the officer or one of the employees in the escrow department of the Bank of America, is that correct? A. That is true.
>
> Q. At Pico and LaCienega? A. They used the copy that I had submitted to them from the Santa Monica Bank.
>
> Q. You took that copy to them? A. That is correct.
>
> Q. Could you say approximately how many transactions you had where the bank themselves drew the

escrow instructions prior to the time that you took the forms over and typed them out in your office? A. Well, maybe three or four.

Q. Did any of those transactions involve two escrows? A. Yes.

Q. And where they involved the two escrows, both were drawn up by the escrow department of the Bank of America, is that correct? A. That is true." (Italics ours.)

Fourth, the defendant disclosed to the Bank the full price paid by each veteran where a single escrow instruction was prepared by her. She testified, without contradiction:

"Q. Let me ask you this: Do you remember who it was who handled those transactions? A. Yes.

Q. Who handled them? A. Ann Gage.

Q. She was an employee in the escrow department at the bank? A. Yes.

Q. Did you have a discussion with her in relation to those single escrows? A. Yes. . . .

Q. Give us the substance of the conversation you had. A. When I brought the escrows in, she said, 'Well, there is only one escrow covering this particular transaction.' And I said, 'Yes; but I received more than that, because, as you know, I paid more than that for the lots' [Rep. Tr. p. 492, lines 4-23] . . . and the bank knew what I had paid for the lots, because the original escrow was in the Pico-

LaCienega Bank and I had discussed that with both Mr. Shacklett (escrow officer) and the different girls in the bank, Miss Gage in particular. . . ." [Rep. Tr. p. 493, lines 3-7.]

"I had told them in each case, where they had a single escrow, that I had given the veteran a receipt for the money and which was either signed by myself or one of my sales people in the office, and that the escrow was for the amount of the loan which was to be paid out of the proceeds of the loan. It was the balance due from the loan." [Rep. Tr. p. 493, lines 15-20.]

Fifth, the appellant had no knowledge as to the appraised value of the several lots, or any of them, until she received the indictment in this case. She testified without contradiction:

"Q. Did you thereafter at any time receive any information as to the appraised value of that (the Weinstein) lot based on an appraisal made by an appraiser designated by the Veterans Administration? A. The first time I knew the appraisal was when I received the indictment.

Q. That is after the indictment had been returned against you here? A. That is true." [Rep. Tr. p. 467, lines 1-9.]

"Q. At the time you prepared those escrow instructions did you know that the Bank of America was required to issue any certificate to the Veterans Administration? A. No." [Rep. Tr. p. 467, lines 19-22.]

The evidence quoted is not contradicted, although the Government called Mr. Shacklett of the Pico-La Cienega Branch and Mr. Ryan of the Santa Monica Branch of the Bank to testify in its behalf.

The uncontradicted evidence above quoted establishes the following:

(1) That appellant did not initiate the escrow method used.

(2) The Bank initiated the escrow method used.

(3) The Bank and also the builder of the houses required double escrows and directed the making thereof.

(4) Where a single escrow was used, appellant told the Bank the exact price received for the lot.

(5) The Bank had full knowledge, from the time that each escrow, whether double or single, was filed of the exact and true price paid to the defendant for each lot.

(6) Appellant never knew, until the indictment was returned, the appraised value of any lot sold by her.

(7) Appellant did not know that a certificate was required to be filed with the Veterans Administration.

In view of these facts, the judgment of the District Court is neither just nor understandable; and with proper deference to this Court, it has affirmed an unjust and unsupported judgment.

III.

There Is No Substantial Evidence in the Record Showing That Appellant Caused the Bank to Make False Certificates to the Veterans Administration.

Appellee has not cited any evidence other than alleged concealment showing that appellant procured the Bank to make false reports. This Court has said, only, that "there is substantial evidence in the record in support of the jury's verdict." (Op. p. 7.)

The Government's proof upon procurement was limited solely to trying to show concealment of actual prices paid for lots from the Bank. It failed dismally in that effort. There was not, nor could there possibly be, any concealment of prices paid when the escrow papers showed such prices.

If there was no concealment, then by what other means or method did appellant cause the Bank to make false reports as to the prices paid for lots? We do not know, nor could the jury know, nor can this Court know, from any evidence adduced, for the record on the point is as silent as the grave.

If appellant used any persuasion, pressure, fraud, deceit, or other means than the alleged but unproven concealment, the Government failed to show it, although it called as witnesses in its behalf various officers and employees of the Bank.

We respectfully assert that there is not one word of evidence, except in respect to the wholly unproven concealment, that shows that appellant caused or procured the Bank to make false certificates as to prices paid to her for lots.

Since the charge of concealment has utterly failed, and since there is no evidence at all that other means or methods were used by appellant to induce the Bank to make false reports, the question logically arises how can the jury's verdict be sustained?

In the total absence of substantial evidence to support the verdict and judgment, this Court has power to review the entire record and to reverse the judgment because not supported by substantial evidence.

Appellant's conviction does not rest upon any material or substantial facts placed in evidence, for such facts are wholly lacking. Instead, her conviction rests upon mere assumptions, improper inferences, and post war hysteria. None of these is recognized by law as a proper basis upon which to deprive an accused of liberty or property, and, especially, of a good name.

Appellant should not be branded as a criminal for life upon the flimsy and wholly unsubstantial evidence adduced by the Government in this case. Moreover, the evidence, such as it is, is at variance with the allegations of the indictment.

Wherefore, appellant prays that this Court grant a rehearing of this cause, and that the judgment of the District Court be reversed.

Respectfully submitted,

JOHN W. PRESTON,
JOHN W. PRESTON, JR.,
By JOHN W. PRESTON,
Attorneys for Petitioner.

Certificate of Counsel.

I, JOHN W. PRESTON, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

JOHN W. PRESTON,